

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:	§	Case No. 08-31630
	§	
POSITIVE HEALTH MANAGEMENT, INC.,	§	Chapter 7
	§	
Debtor.	§	

**APPLICATION OF CHAPTER 7 TRUSTEE PURSUANT TO 11 U.S.C. § 327(e)
FOR ORDER AUTHORIZING RETENTION OF
KIRK A. KENNEDY AS SPECIAL COUNSEL**

THIS APPLICATION SEEKS AN ORDER THAT MAY ADVERSLY AFFECT YOU. IF YOU OPPOSE THE APPLICATION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 20 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE APPLICATION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE APPLICATION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE APPLICATION AT THE HEARING.

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Randy W. Williams, the Chapter 7 Trustee of Positive Health Management, Inc. (the “Trustee”), files this Application Pursuant to 11 U.S.C. § 327(e) for Order Authorizing Retention of Kirk A. Kennedy as Special Counsel to the Trustee (the “Application”), and in support thereof, respectfully submits as follows:

I.
JURISDICTION

1. This Court has jurisdiction to consider this Application pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Application is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The relief requested may be granted in accordance with the provisions of 11 U.S.C. §§ 327(a), 328(a) and 1107(a) and (b).

II.
BACKGROUND

2. On March 11, 2008 (the “Petition Date”), Positive Health Management, Inc. (the “Debtor”) filed a voluntary petition for relief under chapter 11, title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the “Court”).

3. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtor operated its business and managing its property as a debtor-in-possession until October 15, when the Court appointed a chapter 11 trustee.

4. On March 13, 2009 the Court converted the chapter 11 case to a case under chapter 7 of the Bankruptcy Code. Randy Williams was appointed as the Chapter 7 Trustee.

5. Before ceasing operations, the Debtor was formerly in the business of providing healthcare rehabilitation and physical therapy services. At one time the Debtor owned and operated multiple facilities in Houston, San Antonio and El Paso, Texas. As of the Petition Date, the Debtor’s sole facility in operation was in Houston, Texas.

6. Since the Petition Date the assets of the Debtor including equipment and accounts receivables have not been accounted for. In September 2008, the operations of the Debtor were apparently transferred to a company called Priority Healthcare, which is owned by Kimberly

Ziegler, the daughter of the Debtor's former President Ron Ziegler. A preliminary review of the Debtor's records and bank information conducted by the Trustee and/or his professionals suggests that there were significant pre-petition and post-petition transfers of property that need to be examined.

III.

RETENTION OF KIRK A. KENNEDY

7. Pursuant to Section 327(e) of the Bankruptcy Code, the Trustee requests that the Court approve retention of The Kennedy Law Firm (the "Kennedy Firm" or "Mr. Kennedy") as special counsel. Mr. Kennedy has experience in healthcare related litigation in bankruptcy cases.

8. Mr. Kennedy will act as special counsel for the purpose of representing the Trustee in connection with the following matters: (i) examining the Debtor's transfers of property to Priority Healthcare and if necessary pursuing legal action against Priority Healthcare; (ii) recovery of the Debtor's assets including but not limited to accounts receivables, equipment and books and records; (iii) prosecution of Chapter 5 causes of action; (iv) review of any post-petition transfers including payments to professionals; and (v) any legal tasks assigned by the Trustee incident or related to the forgoing.

9. Mr. Kennedy will not represent the Trustee with respect to the following matters: (i) reviewing, examining, or litigation regarding the claim of Bankruptcy Trading & Investments; (ii) prosecution of any claims the estate has against the Debtor's former President Ron Ziegler; and (iii) matters involving case administration.

10. As disclosed in his Affidavit filed herewith, Mr. Kennedy is managing director for Bankruptcy Trading & Investments LLC ("BTI"). BTI is a creditor in this bankruptcy case by

assignment from Texas Capital Bank. In addition to having a claim against the estate, BTI has a judgment against the Debtor's former President Ron Ziegler in the approximate amount of \$2,430,835.80. Because the scope of this engagement as special counsel does not permit or require Mr. Kennedy to represent the estate on matters involving BTI's claim, the Trustee contends that such retention as special counsel satisfies the requirements of 11 U.S.C. § 327(e).

11. The Trustee has selected the Kennedy Firm for its special expertise in handling bankruptcy litigation matters and because Mr. Kennedy is already familiar with the Debtor and its operations. Furthermore, Mr. Kennedy has agreed to a contingency fee structure with respect to certain aspects of this representation.

12. Subject to this Court's approval, the Kennedy Firm will charge the estate for legal services based on the following fee structure:

Priority Healthcare matters. Payment on an hourly basis up to \$35,000 and then, a thirty percent (30%) contingency fee on any recovery after deducting payment of the \$35,000. The current hourly rate for Mr. Kennedy is \$350.00. The estate will pay expenses for the Priority Healthcare litigation to the extent of available funds excluding the retention of experts.

Chapter 5 Causes of Action. Payment of forty percent (40%) contingency fee from any recoveries. The estate will pay all filing fees.

Recovery of Assets (accounts receivables, equipment and books and records etc.). Hourly fee of \$275.00 per hour for Mr. Kennedy and \$175.00 per hour for associate Andrew Haut.

13. The rate of each professional working on this aspect of the bankruptcy case will be clearly reflected in the invoices submitted by the Kennedy Firm to the Trustee. Additionally, the Kennedy Firm will maintain records of costs and expenses incurred in connection with its services.

14. With respect to prosecution of Chapter 5 Causes of Action only, the Kennedy Firm will not be required to record and maintain time on an hourly basis due to the contingent nature of the engagement.

15. Furthermore, while all fees are subject to Court approval after filing of the appropriate final fee application, during the representation the Trustee is authorized to make interim payments to the Kennedy Firm of eighty percent (80%) of any fees earned in accordance with the terms of the Trustee's engagement with the Kennedy Firm as special counsel.

16. Mr. Kennedy has not received a retainer from the Trustee.

17. Mr. Kennedy has stated his desire and willingness to act in this case and render the necessary professional services as special counsel to the Trustee. Mr. Kennedy is well qualified to perform the services described above, and the Trustee knows of no reason why the Kennedy Firm should not be retained. The Kennedy Firm's services will not be duplicative of any other outside professional services.

18. To the best of the Trustee's knowledge, Mr. Kennedy and the Kennedy Firm do not have any connection to the Debtor, its creditors, or any other party in interest or their respective attorneys and accountants except as set forth in this Application and the Affidavit of Kirk A. Kennedy (the "Kennedy Affidavit").

19. The Kennedy Firm intends to apply to the Court for allowance of compensation and reimbursement of expenses in accordance with the applicable provisions of the Bankruptcy

Code, the Bankruptcy Rules, and the Local Bankruptcy Rules, and any applicable orders entered by this Court with respect to the management of fees and expenses in this case.

20. Because of the limited funds in this estate, employment of the Kennedy Firm on the terms and conditions set forth in this Application is necessary, essential, and in the best interests of the bankruptcy estate and its creditors, and therefore should be approved.

21. Based on the Kennedy Affidavit and Trustee's knowledge of the Debtor's business, litigation and relations with creditors and other parties-in-interest, the Kennedy Firm does not represent or hold any interest adverse to the Debtor, its estate, creditors, equity security holders, or affiliates in the matter on which the Kennedy Firm is to be engaged

IV.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Trustee requests this Court enter an order approving the retention of The Kennedy Law Firm as special counsel for the Trustee in this proceeding and granting such other and further relief as the Court may deem just and proper.

Dated: April 24, 2009.

Respectfully submitted,

By: /s/ Randy W. Williams
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was delivered by first class mail, postage prepaid to the U.S. Trustee, the debtor, the debtor's attorney, and creditors identified on the attached on this the 24nd day of April, 2009 unless served by ECF at the time of electronic filing.

/s/ Randy W. Williams
Randy W. Williams

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